United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Reply Brief for Appellants.

I.

FOREWORD.

The appellees in their brief are very strenuous in their efforts and labors to belittle and make fun of the appellants and their efforts and of the importance of the

issues involved, and to thereby drag a red herring across the trail to prevent the Court from understanding what the real questions are and the importance and significance thereof; counsel should rather endeavor to help the Court in solving the issues on this appeal.

The appellees' briefs bristle with quibbling and technicalities, and they seem still to be working in agreement or concert to prevent the Court from determining the questions mandatorily required by the Act of June 25, 1929, and the Government brief seems to carry the burden of such undertaking; this seems strange, as in the summer of 1936 one of the attorneys signing the Government's brief stated that the Government had no interest in the present fight and issues between the railroad and the railway, and that they would stand on the side lines and enjoy the fight without any participation therein.

Why the Government's sudden change? Probably because it realizes now that the Railroad Company by cross bill and answers and appellants Intervening Petition is seriously attacking claims and contentions of the United States which the railway company has not attached or resisted, as hereinafter set out, one among several being the charge that there was no foreclosure in 1875 or 1896, which leave the Railroad free to fix price of lands covered by the mortgage of 1870, which mortgage is still of record and unsatisfied (see first Proviso Joint Resolution of May 31, 1870, appellants' Brief Appendix, p. 62), and also the establishing that there was no foreclosure in 1896, which will require the United States to patent to the Railroad Company lands in place of all the lands patented to the Railway regardless of whether or not the Government can recover said lands from the Railway Company.

II.

AMENDMENT AT BAR.

Appellees are critical that there are statements in the appellants' brief that are not in the petition to intervene or answer and cross bill, and of which the Court may not

take judicial notice. The appellants now ask the Court for leave to amend the intervening petition and the answer and cross bill so as to make a part thereof every statement of fact set out in the appellants' brief and appendix that has not heretofore been set out in the said intervening petition and answer and cross bill, even though the same may be part of the record and of which also judicial notice may be taken in order that this Court may have the advantage of all the facts in its consideration of the questions involved; such an amendment in this Court is admissible under the decisions of the Supreme Court.

In *Jones* v. *Meehan,* 175 U. S. 49 at 60; 44 L. Ed. 1 at 29, the Court said: "*But as this court might, even now,* if justice appeared to require it, *allow an amendment* of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of those facts would have been, had they been duly pleaded. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 447, 32 L. Ed. 788, 794, 9 Sup. Ct. Rep. 469; *Wiggins Ferry Co.* v. *Ohio & M. R. Co.,* 142 U. S. 396, 413, 414, 35 L. Ed. 1055, 1061, 12 Sup. Ct. Rep. 188."

III.
SCOPE OF APPEAL.

This appeal, which is from a decree striking out the intervening petition, which appellants had an absolute right to file, and, denying leave to file same, is considered as on a demurrer to the petition, which opens up the whole record.

The pending petition for an appeal of the railroad company by minority stockholders is from the order striking out its answer and cross bill and from other orders, and the Court, on considering same, can and should consider every question appearing in the record, and should consider and decide same on the appeal after granting it.

Dred Scott v. *Sanford,* 19 How. 393 at 427-8; 15 L. Ed. 691 at 710, after holding that the Court was without jurisdiction of the cause held that that Court could still, and that it should, and it actually did, decide other erroneous rulings in the cause and reversed same for such errors.

There are other decisions to the same effect. *Knotts* v. *First, &c., Co.*, 86 F. (2d) 551 (C. C. A. 4), *certiorari* denied, 81 L. Ed. 869, held that a Circuit Court of Appeals can consider other matters than those considered by the District Court.

This Court can and should, on decisions cited in the appellants' brief (pp. 148-9), decide all the assignments of error of the appellants seeking to reverse the rulings of the lower court on the exceptions to the master's report. When there is a decision of the questions of law on the master's report and there is nothing further left but a re-reference for a determination of the amount of damages, if any, recoverably under the law, there can be an appeal to this Court from the rulings on the questions of law thus decided without waiting for the report assessing the damages.

The Act of May 22, 1936 (49 Stats. 1369, page 7 of appendix to the Government's brief), does not make the appeal to the Supreme Court exclusive as contended by the railway brief (p. 16) under *Arkadelphia Mailing Co.* v. *St. Louis Southwestern Railway Co.*, 249 U. S. 134; 63 L. Ed. 517. That case held, as it was required specifically by the statute to do, that the direct appeal to the Supreme Court was exclusive, for it was an interstate commerce rate case under Judicial Code, Section 238, which is U. S. C. A. Title 28, Section 345, and appeals in such suits by U. S. C. A. Title 28, Section 225, are specifically excluded from this Court. The Act of May 22, 1936, does not exclude an appeal to this Court, and, therefore, one statute making the direct appeal exclusive and the other statute not making the direct appeal exclusive, the appeal to this Court is permissible under the old principle that "naming one excludes the other".

At one time the appellees contended that *Century Indemnity Co.* v. *Nelson*, 303 U. S. 213; 82 L. Ed. 535, reversing 90 F. (2d) 644 (C. A. A. 9), keeps alive the right of the appellees for the direct appeal to the Supreme Court under the Act of May 22, 1936, but from a careful reading of the

statute and the decision one will see instantly that the decision does not have such effect. The Act of May 22, 1936, specifically says that the appeal from the first report must be within 60 days from the ruling on the second report. There is nothing said about the "progress of the trial" as in the California statute—the two statutes are entirely different—and it was an action at law and not a suit in equity.

IV.
MISCELLANEOUS.

The Court in *Bardon* v. *Northern Pacific Railroad Company,* 154 U. S. 324; 38 L. Ed. at 1001 (5/26/94), clearly construed the Joint Resolution of May 31, 1870, to permit only one mortgage, for the Court said: "Some effect is also sought to be given to the fact that Congress authorized the Northern Pacific Railroad Company to place a mortgage upon its entire property. Admitting that such is the fact, the conclusion claimed does not follow. *Congress thereby only authorized a mortgage upon the property granted to the company,* which was the lands without minerals." All italics in this brief are supplied.

Kelly v. *Ex rel Foss Company,* 302 U. S. 1, 82 L. Ed. 39, following *Gibbons* v. *Ogden,* 9 Wheat. 1; 6 L. Ed. 23, 73, held that where *state* legislation is in conflict with *Federal* legislation, the *state* legislation *must fall.*

Under *Windsor* v. *McVeigh,* 93 U. S. 474; 23 L. Ed. 914, as quoted in *United States* v. *Turner,* 47 F. (2d) at 89 (C. C. A. 8), the approximately $81,000,000 deficiency judgment against the Northern Pacific Railroad Company is void, as it states "a judgment is *void,* not just voidable, where, although the Court had jurisdiction of the subject matter as well as the parties, it had exceeded its powers".

The Commissioner certainly thought that all the questions raised by the appellants should be decided, because he stated in his first report (R., 453) and quoted in his second report (R., 709) as follows: "*Every question from the organization of the company* to the date of the Act that *had been, or that now might be, raised, should be presented to the Court and finally determined.*"

V.

REPLY TO RAILWAY BRIEF.

The railway, as well as the Government, futilely seeks to endeavor to legislate by construction the Act of June 25, 1929, and May 22, 1936, and other acts, so as to cut out and leave meaningless clauses of Section 5 of the 1929 Act and leave out words or read in other words in other portions of the Acts. This Court stated the rule in *United States* v. *Pan American Petroleum Company,* 55 F. (2d) 753 at 771 (C. C. A. 9), by quoting Butler, J., in *United States* v. *Mammoth Petroleum Company,* 278 U. S. at 278; 73 L. Ed. 322, that "construction may not be substituted for legislation".

Mr. Justice Harlan in *Sioux City & St. Paul Railroad Co.* v. *United States,* 159 U. S. 349, 360; 40 L. Ed. 177, 181, quoted from *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59; 36 L. Ed. 340, that "nothing is better settled than that *statutes should receive a sensible construction* such as *will effectuate the legislative intention* and if possible, so as to *avoid an unjust and absurd conclusion*".

The railway's statement (p. 22) that the praecipe for the record on appeal was not served, is incorrect as a praecipe, assignments of error and statement of jurisdiction were served April 23, 1938, when the appeal was granted from the District Court to the Supreme Court, which was later annulled, when the record was made for the appeal to the Supreme Court of the United States, which was the same record; this record was presented to Judge Wilbur of this Court.

And on June 7 and 8, 1938, all appellees were duly notified in writing that the same identical record and praecipe which had been presented to the U. S. Supreme Court had been presented to Judge Wilbur on the petition for this appeal, and appellees filed briefs without objection to the record or praecipe.

On July 30, 1938 (R., 1286), the praecipe for the record in this case was served on each appellee after the Clerk of this Court sent the record, on which Judge Wilbur had granted the appeal on July 5, 1938, to the Clerk of the lower

court for certification on appeal. On August 4, 1938, the Clerk of the District Court certified the record (R., 1235, 1239).

The case cited (Ry. Br., p. 22) *Railroad Company* v. *Schutte,* 100 U. S. 647, simply held that where part of the record was sent up the appellant must supply the remaining portion required by the appellee or be subject to dismissal.

After due service of the praecipe showing the record in the case at bar, no objection was made or direction given requiring other documents by the appellees until the filing of their brief. They do not now indicate any documents were omitted.

Meyer v. *Implement Company,* 85 F. 874 (C. C. A. 5) (Ry. Br., p. 24), is not applicable, as it was plain from the certificate of the Clerk that only part of the record was sent up, that the appellant's counsel did not file a praecipe. Consequently, there was not a *prima facie* lawful record, but had there been a *prima facie* legal record, as in the case at bar, the only resort would be a writ of *certiorari* for the balance of the record.

Dixon v. *Brown,* 9 F. (2d) 63 (C. C. A. 5) (Ry. Br., p. 26), is not applicable as the transcript certified by the Clerk was not filed in the Circuit Court of Appeals, but only certified portions of the record that was printed in the lower court were filed.

Chandler & Price Co. v. *Brandtjen, Inc.,* 296 U. S. 53, 80 L. Ed. 39 (Ry. Br., p. 29; U. S. Br., pp. 25, 49), is not applicable as it was an application to intervene, which was not of right, like the case at bar, but was only discretionary with the Court under certain circumstances. Appellees seem to lose sight of the fact that in the case at bar the statute specifically gave the right to intervene or to be heard as an absolute right, and required the Court to determine all the facts and law on all issues that are set up in the intervening petition and cross bill and answer.

In *King* v. *Barr,* 262 Fed. 56 (C. C. A. 9) (Ry. Br., p. 30), the intervention was not sought until *six months* after

a *final decree,* and challenged the validity of the entire proceedings, and the petitioner and his counsel had known for two years of the proceedings and had no excuse for not acting sooner. This was a *discretionary* and *not* as of *right* intervention.

Appellants are not challenging the validity of the entire proceedings here, but asking the Court to require the plaintiff to correct the bill to make it conform to the mandate of the statute and to have every question provided for by the statute heard and determined.

Congress demanded a finding of fact, but the lower court refused to comply.

In *Whitaker* v. *Britson Manufacturing Company,* 43 F. (2d) 485 (C. C. A. 8) (Ry. Br., p. 30), there were two suits with two intervention petitions, one to vacate a judgment for $51,000 and the other to vacate bankruptcy proceedings on the said judgment, and as it was not an intervention of right, but only discretionary, the Court held that as the petitioner *attacked* the *whole proceedings* in both cases as *void,* he could not intervene. The Court gave permission to bring independent suits to vacate the judgment as well as the bankruptcy proceedings.

The Court held in *Board of Grain Commissioners* v. *Lafayette Bank,* 27 F. (2d) 286 (C. C. A. 4) (Ry. Br., p. 31), that the intervening petitioner was a stranger to the proceedings and as there was *no consent* and *no statute* providing for the intervention, it was *discretionary* with the District Court.

Rodman v. *Richfield Oil Company,* 66 F. (2d) 244 (C. C. A. 9) (Ry. Br., p. 33), only held that one bondholder was not entitled to intervene to foreclose a mortgage where proper demand had not been made on the trustee to act and the trustee had not taken any action.

In *Palmer* v. *Bankers Trust Company,* 12 F. (2d) 447 (C. C. A. 8) (Ry. Br., p. 33), the intervening petitioner had bought the bonds after the suit started for the purpose of speculation, and it was simply a discretionary intervention.

The Court said: "The general rule in such cases is that the trustee, being a party to the suit, represents all the bondholders, and that the latter will not be permitted to intervene unless a showing is made that the trustee is not unexceptionable; for example, that the trustee has or is representing a financial interest in the litigation opposed to that of the bondholders, that the trustee is guilty of fraud or is not acting in good faith. *Shaw* v. *Railroad Co.,* 100 U. S. 605, 611, 612, 25 L. Ed. 757; *Richter* v. *Jerome,* 123 U. S. 233, 246, 8 S. Ct. 106, 31 L. Ed. 132; *Skiddy* v. *Railroad Co.,* Fed. Cas. No. 12,922, pages 286, 287; *Farmers' Loan & Trust Co.* v. *Kansas City, etc., R. Co.,* (C. C.) 53 F. 182; *Clyde* v. *Railroad Company* (C. C.), 55 F. 445, 448; *Bowling Green Co.* v. *Virginia Co.,* (C. C.) 132 F. 921, 924; *Continental, etc., Bank* v. *Allis-Chambers Co.,* (D. C.) 200 F. 600, 609."

Lewis v. *B. & O.,* 62 F. 218 (C. C. A. 4) (Ry. Br., p. 33), was a mandamus for an appeal from a denial of a motion to consolidate and intervene by one who was not a necessary party to the suit, and, the Court said, possibly not a proper party, and it was a discretionary intervening petition.

Appellees seek to interpose laches (Ry. Br., p. 34, U. S. Br., p. 50). Appellants' brief (pp. 47-54) shows clearly that the statute prevents the defense of laches, and if it did not, the facts alleged with the ones tendered in the amendment at bar clearly overcome laches.

The Commissioner, in his second report, seemed clearly to have adopted this view, for he said (R., 799): "In any event, the Act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. *Now to say* that the *review cannot be had* because *of lapse of time is to argue* that the *statute should not be obeyed.*"

Again (R., 801): "And it is a little short of a travesty upon that statute (June 25, 1929) to declare that justice cannot be done in this particular instance because, as is supposed, the company did not act promptly."

Congress moves slowly, as it has a right to do, as well as it has the power to amend the Act of 1864 and the Joint Resolution of 1870 and to revoke all remedies and create and establish others, and to take its time about doing so, and this is shown by the Act of July 1, 1898, the non-actions on

the Resolutions of 1907 and 1908 (appellants' brief, appendix, pp. 11, 14) and other resolutions and bills.

Laches is remedial—Congress can and did eliminate laches—and can change statutes of limitations. The Act of 1898 gave notice to the Government and railway company and railroad company that the question of title to the property must some time—not fixing the time—be settled; Congress, as it has the right and power, takes its time for such determination, and it did this by the Act of June 25, 1929. Appellants' Brief (p. 41) sets out, and it will be alleged in the amendment that this Court has been asked to allow, that the Government's attorneys led the appellants to believe until 1936 or later that all their rights and all the controversies between the railway company and the railroad company would be heard and determined in the present suit. After the Government attorneys had used the appellants and their associates for all that they felt they needed them or could use them, they then threw them out and began to laugh at them.

The Government's Brief (pp. 29, 30, 31 and 32) makes desperate efforts to show that Mr. McGowan did not think that this suit should settle the disputes between the railroad and railway, and that the committee did not think so and did not so intend, but the quotations they made from the hearings are very short, and if they had fully quoted Mr. McGowan and others, the Court would see that the committee did not write the bill the way that McGowan and the Attorney-General may have wanted it.

We are filing in the appendix further and full quotations from the Joint Congressional Committee hearings, pages 4648 to 4653 and pages 5247 to 5248.

They laid great stress on the so-called Forest Reserve case, *United States* v. *Northern Pacific,* 256 U. S. 51; 65 L. Ed. 825, and quoted the statement of the Supreme Court. The wording of the statute makes it clear that Congress did not accept the statement of the Supreme Court as to the rights of the railroad and railway company and specifically required the determination of such rights.

Congress then knew, as this Court now knows (Appellants' Brief, p. 32), that in the Forest Reserve case there was at least a tacit agreement between the Government and the railway company by the pleadings, as there is in this case, that the railroad company had no further rights, as the Government alleged that all the rights of the railroad had passed to the railway, and the railway company admitted the same. As the railroad company was not a party to the suit, any statement of the Supreme Court would be merely *obiter dictum,* and the Court could not on the record have decided the rights of the two companies, as there was nothing in issue between them, and the Railroad was not a party to the suit.

The railway company may be the *successor in physical possession* and operation of the lands and property of the railroad company, but it is not the successor in title or ownership, and it has never been shown or decided that the railway company was the successor in ownership and title of the railroad properties and lands.

Attorney-General Harman, 21 Opin. 486 (2/6/97); (J. C. C. 2700), assumed without proof and said that the railway company "has entered into possession and claims ownership" of the railroad property; he only assumed that there was a sale, there was no evidence and he did not decide it. He only stated that the security holders having failed to obtain a Federal charter under Senate Resolution 24 used a state charter.

Attorney-General Moody, 25 Opin. 401 (4/12/05); (J. C. C. 286), uses almost identical language as Harman, as Moody stated that the railway "has entered into possession and has never since claimed ownership" of the railroad properties. Moody held that there was a foreclosure in 1875, which the railway, as well as the railroad, now denies, and he also assumed that there was one in 1896, as he thought that jurisdiction was shown on the record, but he was in error as to this as the record affirmatively shows there was no land or property of Railroad Co. in the Eastern District of Wisconsin.

The Act of July 1, 1898, granted certain indemnity to the railroad company, "or its *lawful successors*", and in the proviso refused to accept the Railway as such "lawful successors", and in *Humbird* v. *Avery,* 195 U. S. 480; 49 L. Ed. 286 (12/12/04), which set out in full and construed the Act, said that "the Northern Pacific Railroad Company made conveyances with warranty to the plaintiffs, Humbird and Weyerhauser, of all the lands, aggregating more than 10,000 acres, the title to which is here in dispute", after July 1, 1898.

If the Railway had title and was the "lawful successor" of the Railroad, why did not the Railway make the deed instead of the Railroad? The Railway also seems to have also conveyed same land to the plaintiff.

It seems quite evident from decisions and the fact that the plaintiffs were represented by the Railway's General Counsel and attorney.

The Court referred to the Railway Company as the "*alleged successors* in interest of the Northern Pacific R. R. Co." Hannon's opinion above was February 6, 1897, more than a year before the Act, and this decision was in December 12, 1904.

The United States intervened in this suit.

In *Levy* v. *Equitable Trust Company,* 271 F. 49 (C. C. A. 8) (Ry. Br., p. 34), the petition to intervene was a discretionary case and not an absolute right. The company was represented by independent counsel, for the Court said: "As regard the condition above mentioned, they failed wholly and completely. On the contrary, it appears that the case for the Denver in the court in New York and on appeal to the Circuit Court of Appeals was in charge of independent counsel of great ability and reputation, not affected by the influences alleged to have controlled the prior corporate actions of the Denver. The reported opinions of those courts show that almost every conceivable defense to the demand of the Trust Company was urged, other than that now asserted by the petitioners, the proof as to which we have already considered."

Merriam v. *Bryan,* 36 F. (2d) 578 (C. C. A. 9) (U. S. Br. p. 51), was an application after the trial on the merits

at which the petitioner was a witness, and it was a case of a discretionary and not an absolute right. The petitioner was further protected by a corporate litigant. There was no offer of an excuse for the three years' delay.

In *Northern Pacific* v. *Boyd,* 228 U. S. 482-515, 57 L. Ed. 931, 944 (4/28/13), the Court said: "But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant, or to induce it to change its position, *there is no necessary estoppel arising from the mere lapse of time. Townsend* v. *Vanderwerker,* 160 U. S. 186, 40 L. Ed. 388, 16 Sup. Ct. Rep. 258.

"In this case the defendants and their *stockholders have not been injured by Boyd's failure to sue.* His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Coeur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation, beginning in 1887 and continuing through the present appeal (1913). * * *

"The *delay* in beginning the present suit—the last of a remarkable series of legal proceedings—*was excusable if not absolutely unavoidable.* Boyd claims that he had no notice of the fact that the stockholders were to retain an interest in the new company, and that, in part, the delay to begin proceedings was occasioned by the railway company itself; since it, as the purchaser of the Coeur D'Alene property, resisted his attempt to revive the judgment. Boyd's silence, in 1896, did not mislead the stockholders, nor did his non-action induce them to become parties to the reorganization plan. They have not in any way changed their position by reason of anything he did or failed to do, and the mere lapse of time under the peculiar and extraordinary circumstances of this case did not estop him, when he revived the judgment, from promptly proceeding to subject the shareholders' interest in property, which, in equity, was liable for the payment of his debt. The decree of the Circuit Court of Appeals is affirmed."

Young v. *Southern Pacific Co.,* 34 F. (2d) 135 (C. C. A. 5) (Ry. Br., p. 36), is not applicable, as the Court stated there was nothing in the bill to show the appellants' con-

nection with the Bogert case, whereas appellants here have shown connection with the whole matter from the beginning, connection and interest in, and support of the Hoover suit, and, as stated in the Boyd case, there has been no injury to the railway company. The railway company's attitude in this suit is, as it has always been, an utter disregard of and deliberate determination, arbitrarily and willfully, to ignore and belittle the rights of all other parties and refuse and evade any discussion of such rights.

VI.

REPLY TO UNITED STATES BRIEF.

The allegations in the record and appellants' brief referred to in the United States brief, page 4, are of vital interest to the Court, as part of the history of the transactions and counsel are only critical because they do not want the Court to know and understand all the transactions and the real situation. They have endeavored to befuddle the issue by such and other criticism, and their quibbling in Note 1 on page 4. The petition to Judge Webster (R., 1246) states that "on March 9, 1938, an order was entered denying (*among other things*) the motions, etc.", but did not set out all the matters in the decree. Yet all the decrees were named and referred to by dates, and the prayer was that "they may be allowed to appeal from each of said orders or decrees in the said cause", clearly being an appeal from all of each decree; in fact, appeals cannot be from part of a decree, but must be from an entire decree.

It seems surprising that the Government attorneys would undertake to ignore various provisions of a statute as they do in U. S. brief (pp. 9, 10). The clauses they mention do not bear out their contention, and under their contention the last clause of Section 5 is meaningless; it is as follows: "And all other questions of law and fact presented to the Joint Congressional Committee appointed under authority of the Joint Resolution of Congress of June 5, 1924 (43 Stats. 461), notwithstanding that such matters may *not be specifically* mentioned in this enactment."

It is true that the Attorney-General and Mr. McGowan did not include such a provision in the bill they drew for

the committee, and counsel may claim that thereby the Attorney-General is not bound by the bill, notwithstanding that the committee and Congress overruled him and inserted such a clause.

When the committee reported and Congress passed the Act of 1929, it had in mind the ruling of the Court in *U. S.* v. *Union Pacific,* 98 U. S. 569, 608; 25 L. Ed. 143 (U. S. Br., p. 35) (1/6/79), and specifically overruled it or met and changed the Court's holding by adding this paragraph and other paragraphs more specific.

The Government admits foreclosures of the mortgages of the railroad, but the Court will remember that both the answer and the cross bill and the intervening petition deny that there was any foreclosure in 1875 or 1896.

U. S. Brief (p. 13) states that the so-called disclaimer of the railroad company (R., 417) was stricken out, but there is no decree, order or intimation in the record that it was ever stricken out.

The Government says (p. 13) that the Commissioner pointed out "that it was not sought by the Government to set aside the sales" by foreclosure (R., 645). The Government attorneys do not want the foreclosure sale set aside, but Congress ordered that the Court determine and declare their validity or invalidity, and if the Court declared them invalid, they would have to set them aside. Congress likewise removed any so-called estoppel that the Government seems to wish to have applied to it. Is this why the Government is supporting the claims and efforts of the railway to defeat the railroad and appellants?

In note 5, page 17 (U. S. Brief), counsel again attempt to belittle and brush aside the issues, and they claim multifariousness, but the Act of 1929 removed the defense of multifariousness.

In the summary of the petition (U. S. Br., p. 18) counsel seem unfamiliar with the allegations of the petition, and are endeavoring to give the impression that the petition alleged that the mortgages were foreclosed. The petition specifically states that there were no foreclosures, but only

an exchange of securities. This summary omits to state that the United States was not a party to the proceedings in 1875 and 1896.

RAILWAY NOT PROPERLY DEFENDING.

Appellees' contention (U. S. Br., p. 20) that there is no allegation that the railway company is not adequately presenting the case against the United States is incorrect, as it is necessary to deny that there was any foreclosure in 1875 and 1896, which the railway company has not done. Besides, the seeming working agreement between the railway company and the Government in this suit to avoid such decision on the mortgages and to deny all rights of the railroad company is prejudicial to its claims against the Government.

The denial of and proof by the appellants that there was no foreclosure in 1875 leaves the railroad free to fix the price of lands covered by the mortgage of July 1, 1870, which mortgage is still of record and unsatisfied, and the railway's failure to assert these matters for the railroad is prejudicial to the railroad.

Furthermore, the appellants by establishing, as they have, that there was no foreclosure in 1896, can require the United States to patent to the railroad company lands in the place of all the lands patented to the railway company regardless of whether or not the Government can recover from the railway company said lands or the value thereof so patented to the railway company. The Railway not only has utterly failed in this respect to protect the Railroad Co., but, on the contrary, is seeking to injure and prejudice these rights of the railroad company.

Counsel cannot find where and when, if at all, the Railway has presented for the railroad the unanswerable argument that the Act of July 1, 1898, construed and/or defined the Act of 1864 and the Joint Resolution of 1870 to provide that the Railroad can make indemnity selections for loss in one or other state from lands "situated within *any state* or *territory* into which such railroad grant extends".

Such omission is another injury to the Railroad Company's rights inflicted by the Railway Co.

There are other commissions and omissions of the railway prejudicial to the railroad's rights against the Government shown by the records and briefs, in addition to the agreement for the amendment of the bill on August 1, 1938, and the failure and refusal of the railway company to permit the railroad company to appeal from the decree of March 22, 1938, which reviewed and passed upon the exceptions to the master's second report and in endeavoring to thwart the minority stockholders' appeal from same, both in the Supreme Court of the United States and in this Court.

Baker v. *Spokane Savings Bank,* 71 F. (2d) 487 (C. C. A. 9) (U. S. Br., p. 36), denied the intervening petition in a discretionary and not an absolute right case, but made the intervening petitioner a plaintiff, though the allegations of the petition were uncertain, and the Court stated: "It is not clear from the allegations of the petition in intervention how the interveners became depositors, whether by depositing money after the transfer of the assets of the society above mentioned, or whether they became creditors by virtue of the terms of the exchange. The trial court denied the motion for leave to intervene, but granted leave to the petitioners to join in the complaint as parties plaintiff."

Yet *Ex Parte Cutting,* 94 U. S. 14; 24 L. Ed. 49 (U. S. Br., p. 23), held that in a discretionary intervention if the petitioner is treated as a party by the lower court, he can appeal, and the Court stated: "From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted: and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. These petitioners seem to have been content to leave their interests in the hands of Akers; and when he went out they went with him. That the court understood this to be so is apparent from the following statement made by the judges in their return to the rule to show

cause: 'On June 6, 1876, said Akers and said St. Louis County withdrew their answers and dismissed their cross bills, both said Akers and said St. Louis County purporting to act for themselves as stockholders, and for all other stockholders who might join them.'

"Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree."

* * * * * * *

"We need not consider what rights these petitioners would have if Akers had not withdrawn his intervention before the decree. After his withdrawal, they had no representative stockholder party to the suit, and their position is the same it would have been if no parties had ever intervened in their interest."

In the case at bar some of the motions of appellants were denied on the merits and not stricken, thus treating them as parties, but denying them full rights as parties, which is reversible error; but this is not a waiver of appellants' contentions that they are entitled as an absolute right to intervene and to appeal.

Aiken v. *Cornell,* 90 F. (2d) 567 (C. C. A. 5) (U. S. Br., pp. 24 and 49), held that it was in the Court's discretion to deny intervention where there was not then a fund *because it was not a class suit.* There was *no statute* in that case, and it was not an absolute right case.

The statement (U. S. Br., pp. 24, 45 and 46) that appellants could bring an independent suit like the Hoover suit, and there is not a decision holding that the United States would be a necessary and indispensable party is incorrect, as, in addition to the cases cited in appellants' brief, there are many decisions of this Court and others that the United States is a necessary and indispensable party to a suit determining the rights between the railroad and railway companies.

On December 12, 1904, long after 1896, in *Humbird* v. *Avery,* 195 U. S. at 509; 49 L. Ed. at 299, in discussing the U. P. R. R. grant, Chief Justice Fuller said: "The selection not having been approved by the Secretary, the title remains in the Government."

Wilson v. *Elk Coal Company,* 7 F. (2d) 112 (C. C. A. 9) (*certiorari* denied, 269 U. S. 578; 70 L. Ed. 426), held that litigants cannot litigate between themselves ownership or equities in property or land so long as the United States held title thereto and was not a party to such suit, as the United States is a necessary party to same. This decision was approved and followed in *Proctor* v. *Painter,* 15 F. (2d) 974 (C. C. A. 9), and in *American Sodium Company* v. *Shelby,* 51 N. W. 355, 276 Pac. 11 at 13. Also in *Washington* v. *United States,* 87 F. (2d) 421 at 429 (C. C. A. 9).

In *Bourdieu* v. *Pacific Western Oil Co.,* 80 F. (2d) 774 at 778 (C. C. A. 9), the Court held and said: "The United States was not made a party to this suit, and it is conceded that the United States is the owner of the oil and gas deposits. It is shown that two of the appellees are lessees of the Government, and by reason thereof have a permissive right to remove the oil and gas deposits. It is apparent, therefore, that neither the court below nor this court has jurisdiction of the subject-matter of the suit, and, therefore, the motion to dismiss made by appellees in the court below should have been sustained.

"In *Bockfinger* v. *Foster,* 190 U. S. 116, 126, 23 S. Ct. 836, 840; 47 L. Ed. 975, it was said concerning *Wilcox* v. *Jackson,* 13 Pet. 498, 10 L. Ed. 264, and *United States* v. *Schurz,* 102 U. S. 378, 402, 26 L. Ed. 167, 173: 'But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.'

"In *Wilson* v. *Elk Coal Co.,* 7 F. (2d) 112, 113, *certiorari* denied, 269 U. S. 587, 46 S. Ct. 203, 70 L. Ed. 426), this court, in a contest involving a preference right in coal lands, said: 'It may be that the appellant had, and still has, a remedy by mandamus against the proper officer of the United States, to compel the issuance of a patent. * * * But, be that as it may, we are clearly of opinion that the courts are without jurisdiction to grant relief in favor of one claiming only an equitable title, as against a party in possession under a lease from the United States, so long as the title remains in the United States.'

"That case was followed by us in *Proctor* v. *Painter,* 15 F. (2d) 974."

In *Skeen* v. *Lynch,* 48 F. (2d) 1044 (C. C. A. 10) (*certiorari* denied, 284 U. S. 633; 76 L. Ed. 539), the Court held that where patent conveying stock-raising lands reserved coal and other minerals, and patentee sought to quiet title to oil and gas as against Government's prospecting permittees, United States held indispensable party (43 U. S. C. A., Sec. 299).

In *Witbeck* v. *Hardeman,* 51 F. (2d) 450 at 454 (C. C. A. 5), Hutcheson, Circuit Judge (concurring) said: "Witbeck had nothing which the court can make him assign, Hardeman claiming not under but adversely to the Witbeck permit. *Wilson* v. *Elk Coal Co.,* (C. C. A.) 7 F. (2d) 112."

In reference to the cases cited (U. S. Br. pp. 47-8), it is a well recognized rule that after a patent is issued and title passed, the United States is not a necessary party to suit over the land involved.

In some of the suits the parties were just trespassers, and in *Barden* v. *Northern Pacific,* 154 U. S. 289; 38 L. Ed. 992 (5/26/94), the United States was brought in by the intervening petition as a necessary party and participated in the suit, and the same is true of *Northern Pacific Railway Company* v. *Sodeberg,* 188 U. S. 526, 47 L. Ed. 575 (2/23/03), but because the United States, even though it was a necessary party, was, by an oversight, not made a party to any of the suits named, does not make those decisions a precedent binding on the courts in other cases.

Bache v. *Hine,* 6 F. (2d) 508 (C. C. A.), was a discretionary intervention, and not, as here, an absolute right to intervene.

VII.

RIGHTS OF MINORITY STOCKHOLDERS TO FILE CROSS BILL OR INTERVENING PETITION.

Davenport v. *Dows,* 85 U. S. 626; 21 L. Ed. 938, a leading case, held that in a class suit by minority stockholders the corporation is a necessary party.

In *Dodge* v. *Woolsey,* 18 How. at 341; 15 L. Ed. at 405, it was held that minority stockholders could enjoin the payment of a tax in violation of the charter contract, and the Court said: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to *restrain* those who administer them from doing *acts* which would *amount* to a *violation* of *charter,* or to *prevent* any *misapplication* of their *capitals* or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed *violation of a corporate franchise,* or the denial of a right growing out of it, for which there is not an adequate remedy at law."

Doctor v. *Harrington,* 196 U. S. 576; 49 L. Ed. 606 at 609-10, held that where minority stockholders brought a suit to enforce the rights of the corporation, that the *corporation* was *not necessarily,* in legal effect, *required* to *be a plaintiff, but may be a defendant.* In this case if the corporation had been made a plaintiff, it would have ousted the United States Court of jurisdiction because of citizenship.

See appendix for statement of or quotations from *National Power and Paper Co.* case, 122 Minn. 355; 142 N. W. 820; *Morgan's Louisiana & Texas R. & S. Co.* v. *Texas Central R. Co.,* 137 U. S. 171; 34 L. Ed. 625; *Neal* v. *Foster,* 34 Fed. 496; *Guarantee Trust & Safe Deposit Co.* v. *Duluth & W. R. Co.,* 70 Fed. 803; Corpus Juris. 503; *Hough* v. *Watson,* 91 W. Va. 161, 112 S. E. 303; *Ogden* v. *Gilt Edge Consol. Mines Co.,* 225 Fed. 723; *Ulman* v. *Iager,* 155 Fed. 1011; *Fitzwater* v. *National Bank of Seneca,* 62 Kan. 163; 61 Pac. 684; and *Secor* v. *Singleton,* 41 Fed. 727.

VIII.

ASSIGNMENT OF ERROR XXVIII.

This assignment of error (R., 1231) goes to the railroad exception 1 to the second report (R., 887) involving the deduction of 347,141.24 acres from the railroad company on account of the Portage, Winnebago & Superior Railroad Co.

This question was partially discussed in appellants' brief (p. 144), under Assignment of Error VII and the ruling of Secretary Smith in 21 L. D. 412, is conclusive and the same having stood since prior to 1896 is binding on the Court under decisions later cited herein.

Secretary Smith restated and reaffirmed what the Commission concede (R., 531) was the long established construction and administration of the Northern Pacific grants by the Secretary and the Land Office, but he says as the same construction and practice had not been established as to other grants, no two grants are similar in terms—the construction is "so clearly wrong that it ought not to be followed".

This established rule of construction and administration of the Act of 1864 and Joint Resolution of 1870 was accepted and adopted by Congress as in the Amendatory Act of July 1, 1898, it was not changed, and is binding and conclusive in the courts. Counsel fails to find that this argument was presented to the Court or Commissioner on behalf of the Railroad Company—its omission was prejudicial to the Railroad Company.

In *United States* v. *Hermanos,* 209 U. S. 338, 52 L. Ed. 821, the Court said: "And we have decided that the *re-enactment* by Congress, *without change,* of a *statute* which had *previously* received long-continued *executive construction,* is an *adoption by Congress of such construction. United States* v. *G. Falk & Bro.,* 204 U. S. 143, 152, 51 L. Ed. 411, 414, 27 Sup. Ct. Rep. 191."

In *Bardwell* v. *Petty,* 52 App. D. C. 310, at 311, 286 Fed. 772, the Court held and said: "Moreover, on June 30, 1902 (32 Stat. 547), the Congress, which is presumed to know the judicial interpretation put upon its legislation, deliberately amended its Act of June 19, 1878, but

did not amend away or modify in any particular the judicial interpretation given to the earlier act in *Murphy* v. *Preston, supra.* Congress having the opportunity to meet the decision of the Court in *Murphy* v. *Preston,* and having declined to do so, we must assume that that decision met with legislative approval."

"Legislation once judicially, or even administratively, interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord, and not at variance, with the legislative intention. *Stuart* v. *Laird,* 5 U. S. (1 Cranch) 298, 308, 2 L. Ed. 115; *United States* v. *Midwest Oil Co.,* 236 U. S. 469, 473, 35 Sup. Ct. 309, 59 L. Ed. 641; *United States* v. *Baruch,* 223 U. S. 191, 200, 32 Sup. Ct. 306, 56 L. Ed. 399; *Edwards* v. *Darby,* 25 U. S. (12 Wheat.) 206, 209, 6 L. Ed. 603; *Hahn* v. *United States,* 107 U. S. 402, 406, 2 Sup. Ct. 494, 27 L. Ed. 527; *United States* v. *Philbrick,* 120 U. S. 52, 59, 7 Sup. Ct. 413, 30 L. Ed. 559; *Robertson* v. *Downing,* 127 U. S. 607, 613, 8 Sup. Ct. 1328, 32 L. Ed. 269; *United States* v. *Healey,* 160 U. S. 136, 141, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States* v. *Hermanos,* 209 U. S. 337, 339, 28 Sup. Ct. 532, 52 L. Ed. 821; *Komada* v. *United States,* 215 U. S. 392, 396, 30 Sup. Ct. 136, 54 L. Ed. 249.

"The construction given to the act of 1878 in *Murphy* v. *Preston,* standing as it has for so many years unmodified and unreversed, should not be changed at this late day, and must be considered as *stare decisis.* To hold otherwise would leave little or no application for a very sound, wise, and meritorious legal principle designed to settle definitely questions of law, and to protect the rights of citizens who, in the acquisition of property and the assumption of responsibilities, have accommodated themselves to the law as interpreted."

IX.

ASSIGNMENT OF ERROR XXIX.

This assignment of error (R., 1232) was to the action of the Court in overruling the second exception of the railroad company (R., 888) involving the rights of the railroad to 637,580.89 acres in the *Tacoma Overlap.* The Commissioner (R., 857) says: "So I feel bound to come to a decision upon principle, as I find no authorities which serve as a precedent nor other clue. We are left

without any aid except the language employed and, after all, the old-time rule of taking the language as it stands and interpreting it is the safest guide."

Then the Commissioner, and he was followed therein by the lower Court, proceeded and sought to "Legislate by Construction" and thereby change the statute. See *U. S.* v. *Mammoth Petroleum Co.,* above.

The Commissioner's construction is very strained and his citations do not sustain him.

Under the Act of 1864 and Joint Resolution of 1870, where the words are given their usual and accepted meaning, it is manifest that the lands within the Tacoma Overlap were lost to the grant and the Railroad Co. is entitled to the indemnity claimed. This is the principle of the Forest Reserve case above: while the Commissioner states there was no final judgment in that case, yet the Court on reversing gave the litigants an option, and in event of its not being accepted, stated what the rights of the railroad company were.

The Commissioner criticises the decision of Secretary Noble in C. St. P. M. & O. Ry. Co., 9 Land Decisions, 483, 486, 10/11/89, while admitting he does not understand it, won't take the time and energy, but prefers to make his own guess rather than understand and follow a 49-year-old departmental decision in favor of the railroad company, which decision, being unchanged by Congress, is of such character as the Supreme Court says justifies the conclusion that it expresses the congressional intention. *U. S.* v. *Midwest Oil Co.,* 236 U. S. 469, 59 L. Ed. 641; *Bardwell* v. *Petty,* above. Not having been changed by Congress in the Act of 1898, or other Acts, it is adopted and is conclusive and obligatory on the courts. *U. S.* v. *Hermanos,* above.

This exception was restricted to a pure question of law and the District Court stated it was a finely drawn question in which there was some doubt in his mind and therefore he should follow the Master. The Master's conclusion of law are not binding in anywise on the Court;

only his findings of fact carry weight or are conclusive or disputed testimony.

Statements of the Commissioner (R., 531-2) indicate that no argument was presented to him on behalf of the railroad company to the effect that under the foregoing decisions the Noble decision is now obligatory on the courts, such omission is injurious to the rights of the Railroad Company.

X.

ASSIGNMENT OF ERROR XXV.

This assignment (R., 1231) contests the action of the Court in *sustaining* the Government's *twelfth exception* (R., 902) to the master's second report.

The Commissioner held that the Absaroque and Bear Tooth became subject to selection when they ceased to be a part of the Crow Indian Reservation and are as much within the rule of the Forest Reserve case as any other land. This is a correct construction of the Forest Reserve case and the opinion of Attorney General Wickersham in 1912 in 41 L. D. 571, is to the same effect.

The rule is sustained by *United States* v. *Southern Pacific,* 223 U. S. 565, 56 L. Ed. 553 (2/26/12), and *Ryan* v. *Central Pacific,* 99 U. S. 384, 25 L. Ed. 305 (2/3/79).

In *Buttz* v. *Northern Pacific Railroad Co.,* 119 U. S. 55, 30 L. Ed. 330 (11/15/86), the court held that the Indians neither took or held any title against the Railroad Company, and the Court said: "The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater portion of the lands along the entire route to Puget Sound, on which the road of the Company was to be constructed, was subject to this right of occupancy by the Indians. With knowledge of their title and its impediment to the use of the

lands by the Company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the Act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the Act of Congress, that they would extinguish the title as rapidly as might be 'consistent with public policy and the welfare of said Indians'. Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the Company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

Buttz v. *Northern Pacific Railroad Company* was followed and approved in the following cases:

Jones v. *Meehan,* 175 U. S. 8, 44 L. Ed. 53 (10/30/99).

United States v. *Ashton*, 170 Fed. 517 (C. C. Wash.) 4/19/09).

United States v. *Moore,* 161 Fed. 515 (C. C. A. 9) (5/18/08).

M. K. & T. R. Co. v. *Roberts,* 152 U. S. 114, at 117, 38 L. Ed. 377, at 379 (3/5/94), which says that the principle asserted in the Buttz case has never "been seriously controverted".

A. & P. Ry. Co. v. *Mingus,* 165 U. S. 438, 41 L. Ed. 780 (2/5/97), which held that courts have nothing to do with obtaining releases from Indians.

Clairmont v. *United States,* 225 U. S. 556, 56 L. Ed. 1203 (6/10/12), which held Montana Flathead Indian Reservation was not Indian as it passed to the Northern Pacific, so Indian Anti-Liquor Law did not apply, citing Buttz and Townsend cases.

U. S. v. *Portneuf-Marsh Valley Irr. Co.,* 213 Fed. 603 (C. C. A. 9) (5/11/14).

St. Paul & C. Ry. Co. v. *Phelps,* 137 U. S. 542, 34 L.

Ed. 722 (12/22/90), which held the same as to the Minnesota Indian lands as the Buttz case.

The lower Court stated it did not care what Judge VanDeventer, or Attorney General Wickersham, or the Land Department had done, and it would overrule them and the Commission.

The Court did not mention *U. S.* v. *Hermanos,* above.

In *United States* v. *Moore,* 161 Fed. Rep. 513 (5/18/08) (C. C. A. 9), reversing 154 Fed. 713, the Court held that Indians to whom lands were allotted in severalty under such treaty acquired a mere right of possession and use, the title remaining in the United States, and that the government was therefore entitled to maintain ejectment against a third person, who had ousted the Indian allottees from possession. The Court said: "It is too late to talk about the original title to all of the lands in the United States having originally been in the Indians. The contrary was long ago settled. 'Undoubtedly,' said the Supreme Court in the comparatively recent case of *Jones* v. *Meehan,* 175 U. S. 18, 20 Sup. Ct. 4, 44 L. Ed. 49, 'the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States, without the consent of the United States', citing *Johnson* v. *McIntosh,* 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation* v. *Georgia,* 9 Pet. 1, 17, 8 L. Ed. 25; *Worcester* v. *Georgia,* 6 Pet. 515-544, 8 L. Ed. 483; *Doe* v. *Wilson,* 23 How. 457-463; 16 L. Ed. 584; *United States* v. *Cook,* 19 Wall. 591, 22 L. Ed. 210; *United States* v. *Kagama,* 118 U. S. 375-381, 6 Sup. Ct. 1109, 30 L. Ed. 228; *Buttz* v. *Northern Pacific R. Co.,* 119 U. S. 55-67, 7 Sup. Ct. 100, 30 L. Ed. 330."

In *United States* v. *Ashton,* 170 Fed. 509 at 517 (C. C. Wash.) (4/19/09), the Court held and stated: "The conclusions deducible from the premises are as follows:

"(a) The aboriginal inhabitants of this country were not seised of title to real estate. *Johnson* v. *McIntosh,* 8 Wheat. 543, 5 L. Ed. 681; *United States* v. *Cook,* 19 Wal. 591, 22 L. Ed. 210; *Buttz* v. *Northern Pacific R. Co.,* 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; *United States* v. *Moore,* 161 Fed. 513, 88 C. C. A. 455. All exclusive rights

of the Indian complainants, as original occupiers of the country, were terminated by the Oregon donation law, and were relinquished by them by the treaty of 1854."

In *United States* v. *Portneuf-Marsh Valley Irr. Co.*, 213 Fed. 601 at 603 (C. C. A. 9) (5/11/14), affirming 205 Fed. 416, the Court held and stated: "We think that the grant of rights of way through the 'public lands and reservations of the United States', in the Act of March 3, 1891, was intended to include Indian reservations. At the date of that act the Indian reservations were the only considerable reservations of the United States. Military reservations were comparatively small and compact, and were not contiguous to arid lands which might be reclaimed by irrigation. The forest reserve policy of the government had not then been inaugurated. That the United States had the power to grant rights of way over Indian reservations, notwithstanding its treaty obligations with the Indians, had already been firmly established. *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330. It was reaffirmed in *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377. In the case last cited, although a treaty had been made between the United States and the Osage Indians, reserving to the latter the lands through which the railroad was granted its right-of-way, the court said: 'The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the 200 feet as a right-of-way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government.'

"That an Indian reservation is included in the term 'reservations of the United States' is indicated by the decision in that case, as well as by the *Leavenworth, etc., R. Co.* v. *United States,* 92 U. S. 733, 747 (23 L. Ed. 634) in which the court said: 'Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or for other purposes.'

"And referring to the lands reserved by treaty to the Osage Indians, the court observed: 'The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in an-

other and broader sense, to the United States for the use of the Indians.'

"In the case of Rio Verde Canal Co., 27 Land Dec. Dept. Int. 421, Mr. Secretary Bliss in his opinion said: 'The provisions of section 18, Act of Congress of March 3, 1891, granting the right of way through the public lands and reservations of the United States for irrigation purposes, include Indian reservations, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses. * * * There is no reason apparent why such reservation should not be subject to the grant of the right of way as any other reservation, and the executive department having jurisdiction of such reservation will determine whether it can be so located, and will withhold or give its approval accordingly.' "

These constructions of the grant since the Buttz case of 1886 not having been changed by Congress have thereby been adopted by Congress and are obligatory on the courts under *U. S.* v. *Hermanos* and other decisions, above.

In *Direction Disconto-Gesill-Schaft* v. *U. S. Steel Corp.*, 267 U. S. 22, 69 L. Ed. 495, at 498, the Court said: "But it (the U. S.) prefers to consider itself civilized and to act accordingly."

In *Beyn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 69 L. Ed. 374 at 387, the Court said: "The contrary view, urged by appellees, would greatly qualify, perhaps delete, this subsection, and would place the United States in the unenviable position of positively *refusing,* after hostilities has ended, *to give up property which had been taken contrary to their own laws.* It would require very clear words to convince us that Congress intended any such thing."

The Government is bound by the same rules as to contracts as are applicable to contracts between private parties.

The Courts must apply on Government contracts the ordinary principles of contracts. Smoot's Case, 15 Wall. at 45, 21 L. Ed. 107.

"When the Government enters into a contract with an individual, it deposes as to the matter of the contract,

its constitutional authority and exchanges the character of legislator to that of moral agent with the same rights and obligations as an individual." 30 Ct. Cls. R., 352, 361; 1 *id.* 191; 11 *id.* 520; 28 *id.* 77, 105.

"When the Government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of this obligation." *U. S.* v. *N. A. C. Co.,* 74 Fed. R. 145, 151 (C. C. S. D., N. Y., 4/27/96).

"If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there." *Cooke* v. *U. S.,* 91 U. S. 398; 23 L. Ed. 237.

"This is extending the rule between private parties to the Government." *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, judgment affirmed on rehearing, 261 U. S. 610, 67 L. Ed. 286, 825.

XI.

ASSIGNMENT OF ERROR XXX.

This assignment (R., 1232) involves the third exception of the railroad company to the second report (R., 890), which exception contends that there is no warrant to be found in the terms of the Joint Resolution limiting the selection and second indemnity to losses arising in the state or territory to which the limits appertain.

The Commissioner held otherwise and it seems that his holding is contrary to the decision in *United States* v. *Northern Pacific,* 256 U. S. 51, 65 L. Ed. 825.

The Commissioner discusses this question (R., 703, 830), but fails to mention (they may not have been drawn to his or the Court's attention) the decision in 22 L. Ed. 187, being the opinion of Attorney General Garland (1/17/80), 19 Ops. A. G. 498, the decision in 24 L. D. 417, and 26 L. D. 312, all three of which were followed and approved by Attorney General Wickersham (7/24/12), in 41 L. D. 571, where he held that the Railroad Company, in making indemnity selections, was not restricted to the State or Territory in which the loss occurred.

The principle of adoption by Congress of such rulings is applicable here. (See cases above.)

The Act of July 1, 1896, construed and/or defined the Act of 1864 and the Joint Resolution of 1870 to permit the Railroad Company to make indemnity selections for loss in one State or Territory from lands "situated *within any State* or *Territory* into which such railroad *grant extends*".

This is certainly an adoption of the construction of the grant established in above Department Decisions.

XII.

ASSIGNMENT OF ERROR XXXI.

This assignment (R., 1232) involves the denial of the railroad's fourth exception (R., 890) that the Commissioner was wrong in holding that the Government may reserve or appropriate to its own uses lands in indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

The vice of this is that it gives the Government the right to make the choice as to land to go to the railroad whereas the grant gave the railroad the choice of the land.

The Government cannot withdraw all the good lands and force the Railroad to take the worthless lands.

The cases cited above, including the Forest Reserve case, and others that the Government can do no wrong are applicable here.

The Commissioner's reasoning (R., 828, 829) is without merit and is not persuasive.

XIII.

ASSIGNMENT OF ERROR XXVI.

This assignment (R., 1231) involves plaintiff's exceptions to the second report Nos. 16 to 27, inclusive (R., 905 to 921), and 38 and 39 (R., 929-30), involving substitution of base, which exceptions the Court allowed. The mineral indemnity provision in the grant of 1864 was as follows: "That all mineral lands be, and the same are hereby, ex-

cluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road *and within fifty miles thereof* may be selected as above provided."

But when the Act was published by the Government in 13 Stats. 365, the underscored words in the last line "and within fifty miles thereof" were omitted and the error was not discovered until 1904. The Commissioner made in effect a finding of fact on the testimony and stated as follows (R., 791): *"I have no difficulty whatever in saying that it sufficiently appears from the testimony that the company did act to its prejudice in reliance upon the statute as printed, and that had the statute been correctly printed or had the company's officers then known of the mistake, it would have acted differently."*

The Court was bound by this finding of fact by the Commissioner. It must be remembered that the *error was made by the Government,* as its Attorney General supervised the printing (R., 787) and the true copy was kept by the Government. The Commissioner also stated (R., 799): "In any event the Act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. *Now to say that the review cannot be had because of lapse of time is to argue that the statute should not be obeyed."*

The Commissioner held that it was a mistake of fact (R., 808) and that the railroad is entitled to relief. He further held that if it was a mutual mistake of law, the railroad is entitled to relief therefrom and quoted Pomeroy and others to sustain the position. The Commissioner held (R., 785) that the United States seeking equity must do equity.

The law does not permit anyone to benefit by his own or his employees' wrongs and errors and the same principle is applicable to the United States under Smoot's case and others, above.

Likewise, the Supreme Court has stated (above) that the United States should not and will not do any wrong.

Because the United States will not do any wrong Con-

gress passed the July 1, 1898, Act to rectify wrongs and injury done the Railroad Company through errors and mistakes of its Executive Departments where there would have been multitudinous litigation had the making of the necessary corrections and compensation been left to the courts. See *Humbird* v. *Avery,* above.

This Act shows the Congressional intention, rather determination, that wrongs and injuries due to mistakes of Government officials must be compensated and rectified as quick as is reasonably feasible.

In the instant question Congress thought that as only the Government and the Railroad Company were interested in the question that the injury done the Railroad (as found by the Commissioner as a fact) by the error in printing the statute, the compensation due the Railroad therefor could easily be adjusted in one suit, and accordingly enacted the 1929 Act. Then considering the 1898 and 1929 Acts together it is clear Congress intended that the Railroad must be compensated for such injury in the instant suit.

XIV.

ASSIGNMENT OF ERROR XXVII.

This assignment (R., 1231) involves the granting by District Court of plaintiff's exceptions, (A): Nos. 40, 43 (a), (b), (3) and 1,600 and 2,217 acres in (h), 44, 48 and 49 on the availability of withdrawing lands subject to indemnity selection.

(B): Nos. 55 and 56, involving Fort Ellis Military Reservation.

The Commissioner discussed the matters involved in plaintiff's Exception Nos. 40, 43, (e) and 1,600 and 2,217 acres in (h) as well as Nos. 55 and 56 along with plaintiff's Exception 12, above, and what is said as to Assignment of Error XXV, above, on said Exception 12 is applicable to these other exceptions mentioned in this sentence. There are other apparent reasons and also reasons stated in the report sustaining the Commissioner on these questions.

In Exceptions Nos. 43 (a), (b) and (d) the United States contended the Commissioner found facts contrary to evidence on testimony which was in dispute; such finding is binding on the District Court. Exception 40 is contrary to the Forest Reserve case.

A careful reading of the Commissoner's report shows there is no merit in plaintiff's Exception No. 44. Plaintiff's Exception 48 simply raised a question of fact on disputed testimony and the report, therefore, could not be changed by the Court.

Plaintiff's Exception No. 49 is not tenable as it is contrary to the Forest Reserve case.

Plaintiff's Exceptions Nos. 55 and 56 are without merit for the same reasons that Exception No. 12 has no merit.

The constructions of the grant in decisions cited to Exception No. 12, having been adopted by Congress are, under the Hermanos case and others, above, obligatory on the Courts.

The relief and decisions requested in the Conclusion of appellant's brief should, we respectfully submit, be given.

Respectfully submitted,

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ROBERT L. EDMISTON,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Appellants.

December 15, 1938.

APPENDIX

ACT OF JULY 2, 1864.

AN ACT granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route.

13 Stat. 365.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, * * * and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons herein before named are hereby appointed commissioners, and shall be called the Board of Commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said Board of Commissioners shall be held at the Melodeon Hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publish-

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ing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upno the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to *to* the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners the treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

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rant of right way.

Sec. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the con-

struction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station building, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

Authority t take from adja cent lands mate rial for construc tion.

Right of wa 200 feet in widt on each side o said railroad.

Right of wa exempt from tax ation.

Indian titles t be extinguishe by the United States.

Sec. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further,* That all mineral

Grant of land.

Forty sectio per mile in t Territories.

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Other lands lieu of those r served, etc.

Land limits.

If route is up the line of a other aided ro former gra shall be deduc ed.

Road havi previous gra may assign.

Mineral" ds not grant-

Agricultural ds may be se-ted in lieu of eral lands.

Mineral" does include iron coal.

lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: *And provided further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

'he President appoint three mmissioners examine road.

Sec. 4. *And be it further enacted,* That whenever said "Northern Pacific Railroad Comupany "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required in this act, the commissioners shall so report to the President of the United States, and patents of lands as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and conterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed: *Provided,* That no more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided also,* That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

o m missioners report to the sident.

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Proviso as to id previously lt.

Road to be con-ructed as a st-class" rail-d.

Sec. 5. *And be it further enacted,* That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided,* That the said company shall not charge the Government

Rails of Ameri-n iron. (See 16 Stat., 378.)

Gauge to be iform.

Telegraph line.

Condition as to arges for Gov-

higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

ernment tran portation and t egraphic servic

Other roa may form ru nings connectio on equitab terms.

SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same is hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

Lands to be su veyed as fast construction road may requi

Governme lands not to sold for less th $2.50 per acre.

SEC. 7. *And be it further enacted,* That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary or proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and

Authorizes co pany to take a lands necessa for constructi of its road.

200 feet on ea side.

Lands for pots, etc.

Damages to determined commissions.

Procedure.

benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purpose aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or person subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening

What proceedings in cases of lands held by any infant or person subject to any legal disability.

Other proceedings.

Proceedings when lands are unoccupied.

Claims barred if not made within six years.

of said road across any land, all claims to damages against said company shall be barred.

Grants made subject to certain conditions.

SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: that the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

Whole road to be completed by July 4, 1876.

Joint res. May 7, 1867, time extended two years; joint res. July 1, 1868; sec. 3 amended.

SEC. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

Congress may do anything necessary to insure a speedy completion of the road.

SEC. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.

All people of the United States may subscribe to the stock, until whole amount taken up.

No bonds to be issued without consent of Congress.

SEC. 11. *And be it further enacted,* That said Northern Pacific Railroad, or any part thereof, shall be a post-route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

To be a post route and military road.

Congress may restrict charges for Government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

Company to accept terms, conditions, &c., within two years.

SEC. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

Annual report to be verified by affidavits of president and six directors of company.

Election of esident and ce - president om board of di- ctors.

Treasurer and cretary.

Term of office president, vice- esident, and di- ctors not to ex- ed three years.

Directors em- wered to make -laws, rules and gulations.

Directors may l vacancies in ard.

Directors em- wered to ap- int engineers, ents, &c.

Directors to re- ire payment of n per centum sh assessment, d balance of ubscription nen needed.

SEC. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act shall, as soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and as soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and affects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever, which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect

or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

Forfeited st may be redeem on terms p scribed by dir tors.

SEC. 17. *And be it further enacted,* That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

Company thorized to acc other gran franchises, &c.

SEC. 18. *And be it further enacted,* That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any State through which any portion of said railroad line may pass previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

Consent of St legislatures to obtained.

SEC. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

Act to be n and void, unl two millions dollars of st are subscribed within two yea

SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

Congress m add to, alt amend, or rep this act, havi due regard the rights of company.

JOINT RESOLUTION OF MAY 7, 1866.

No. 34.—A RESOLUTION extending the time for the completion of the Union Pacific Railway, eastern division, and Northern Pacific Railroad.

14 Stat. 3

* * * * * * * *

SEC. 2. *And be it further resolved,* That the time for commencing, and completing the Northern Pacific Railroad, and all its several sections, is extended for the term of two years.

Northern Pac Railroad.

JOINT RESOLUTION OF JULY 1, 1868.

Stat., p. 255.

No. 47.—JOINT RESOLUTION extending the time for the completion of the Northern Pacific Railroad.

ction 8, chap. 13 Stat., 370, nded.

me extended July 4, 1879. res. of May 866, 14 Stat.,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, "is hereby so amended as to read as follows: That each and every grant, right, and privilege herein, are so made and given to and accepted by said Northern Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from and after the second day of July, eighteen hundred and sixty-eight, and shall complete note less than one hundred miles per year after the second year thereafter, and shall construct, equip, furnish, and complete the whole road by the fourth of July, anno Domini eighteen hundred and seventy-seven.

JOINT RESOLUTION OF MARCH 1, 1869.

5 Stat., 346.
3 Stat., 370.

No. 15.—JOINT RESOLUTION gra[n]ting the Consent of Congress provided for in section ten of the Act incorporating the Northern Pacific Railroad Company, approved July second, eighteen hundred and sixty-four.

onsent of Congress given to ie mortgage ds for construction purses.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the Northern Pacific Railroad Company to issue its bonds, and to secure the same by mortgage upon its railroad and its telegraph line, for the purpose of raising funds with which to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon; and the term "Puget Sound," as used here and in the act incorporating said company, is hereby construed to mean all the waters connected with the Straits of Juan de Fuca within the territory of the United States.

Ieaning of rm "Puget ind".

JOINT RESOLUTION OF APRIL 10, 1869.

No. 20.—JOINT RESOLUTION granting Right of Way for the Construction of a Railroad from a Point at or near Portland, Oregon, to a Point west of the Cascade Mountains, in Washington Territory.

16 Stat., 57.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided,* That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further,* That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.

Company authorized to extend its branch line from Portland to Puget Sound.

Not entitled hereby to any subsidy or additional lands.

In *F. N. B.* v. *Flushem,* 290 U. S. 509, 78 L. Ed. 475, the Court said: "The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not remove the taint of illegality.* *Jackson* v. *Ludeling,* 21 Wall. 616, 22 L. Ed. 492; compare *Jones* v. *Milwaukee & M. R. Co.,* 6 Wall. 752, 18 L. Ed. 885; *Northern P. R. Co.* v. *Boyd,* 228 U. S. 482, 507, 57 L. Ed. 931, 943, 33 S. Ct. 554. Nor is it material that the Corporation became insolvent later, long before entry of the order of sale, and that, but for the appointment of receivers, some non-assenting debenture holders would have obtained a preference. The lack of equity in the bill when filed is not cured by the insolvency later occurring. Compare *Pusey & J. Co.* v. *Hanssen,* 261 U. S. 491, 67 L. Ed. 763, 43 S. Ct. 454. Moreover, the insolvency which supervened was precipitated by the Reorganization Committee, then the only plaintiffs in this suit. It was at their request that the Bankers Trust Company, as trustee, declared the principal of the debentures due; recovered judgment thereon for $10,673,000; and intervened as party plaintiff. These acts were steps in carrying out the plan in which the Corporation, the Committee and the Trust Company co-operated."

J. C. C. HEARINGS, 5247-8.

Under the 1896 reorganization proceedings the Northern Pacific Railway Co. acquired the land grant and other properties of the Northern Pacific Railroad Co. On November 10, 1896, the Northern Pacific Railway Co. issued its prior lien and general-lien mortgages, subjecting the land grant thereto (pp. 4724-4773).

In the case of the *United States* v. *Northern Pacific* (256 U. S. 51), the Supreme Court of the United States said, in referring to the obligations of the Northern Pacific Railroad Co. and the Northern Pacific Railway Co.:

*"An execution sale under a consent judgment, where the consent is, in effect, not the act of the defendant, but that of the plaintiff prosecuting the action, is in reality merely a voluntary transfer. To give it any better standing would be the grossest sacrifice of substance to form." *Title Ins. & T. Co.* v. *California Development Co.,* 171 Cal. 173, 210, 152 Pac. 542. See also *Metcalf* v. *Moses,* 35 App. Div. 596, 55 N. Y. Supp. 179, 161 N. Y. 587, 56 N. E. 67; *Mechanics Nat. Bank* v. *Burnet Mfg. Co.,* 33 N. J. Eq. 486; *Atwater* v. *American Exch. Nat. Bank,* 152 Ill. 605, 38 N. E. 1017; *Skinner* v. *J. I. Case Threshing Mach. Co.,* Ind. , 182 N. E. 99; *Hill* v. *Pioneer Lumber Co.,* 113 N. C. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621.

The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company, and there is no need here for distinguishing one company from the others.

It is obvious, therefore, that the present Northern Pacific Railway Co. carries all of the obligations of the Northern Pacific Railroad Co. arising out of the grant, and that by succeeding to the rights of the Northern Pacific Railroad Co. the Northern Pacific Railway Co. is responsible for the obligations of the Northern Pacific Railroad Co. Furthermore, it must be remembered that in the 1875 reorganization proceedings and in the 1896 reorganizations proceedings the United States was not a party.

While Mr. Donnelly (p. 522) stated that the obligations imposed upon the old company rest upon the new company, he stated that when in 1896 the lands were obtained by an independent purchaser (the Northern Pacific Railway Co. purchased them from the Northern Pacific Railroad Co.) that the lands were freed from the provisions of the resolution of 1870; he stated again (p. 523) that the granted lands were subject to the obligations of the Joint resolution under the foreclosure of 1896, at which time the purchaser, the Northern Pacific Railway Co., took them freed from the obligation of the resolution of 1870. Mr. Donnelly's position here is contrary to the law and to the facts. The Northern Pacific Railway Co. was not an independent purchaser for the reason I have indicated under item 9 in connection with the sale of the lands of the grant under the 1896 reorganization. The Supreme Court of the United States in the Boyd cases (p. 3183-3234) repudiated the theory that the Northern Pacific Railway Co. was an independent purchaser in the 1896 foreclosure. Mr. Donnelly and Mr. Bunn were the attorneys for the Northern Pacific in the Boyd cases. Mr. Bunn (p. 586) indicated some uncertainty as to the present status of the Northern Pacific Railroad Co. I observed (p. 46-49) that the Northern Pacific Railroad Co. since 1896 has for practical purposes been a defunct concern. It is kept alive, however, by the Northern Pacific Railway Co. which controls the stock of the old Northern Pacific Railroad Co. and it holds annual meetings in the offices of the Northern Pacific Railway Co.

J. C. C. HEARINGS, pp. 4648 to 4653.

Mr. McGowan: In connection with the value of the stock in the reorganized Northern Pacific Railway Co.—

Senator Kendrick (interposing): Might I ask right there just for a date? Under what plan of reorganization did the Northern Pacific Railway Co. first come into existence?

Mr. McGowan: The reorganization plan is dated March 16, 1896 (pp. 2829, 2854). The Northern Pacific Railway Co. grew out of the old Superior & St. Croix Co. That company was revivified, you might call it. It had been dormant for a great many years. The stock of that company was increased to $155,000,000, the name changed to the "Northern Pacific Railway Co.," and that is the company that was a part of the 1896 reorganization and it is the present existing Northern Pacific Railway Co. The syndicate agreement is dated March 16, 1896 (p. 1979), and the agreement between J. P. Morgan & Co. and the Northern Pacific Railway Co. is dated July 13, 1896 (p. 1981).

Senator Kendrick: Was that supposed to represent a branch of the main line of the Northern Pacific, the St. Croix Railroad?

Mr. McGowan: Well, there is a long history in connection with that, Senator Kendrick.

Senator Kendrick: I do not care to divert your attention to another point at all, but I had supposed that that was a branch of the Northern Pacific.

Mr. McGowan: The old Superior & St. Croix—I will not go into all the details.

Senator Kendrick: Extending from Duluth to St. Croix?

Mr. Kerr: It is covered, Senator, completely by one of the statements which I have filed here. The Superior & St. Croix Railroad Co. was created by a special act of the Legislature of Wisconsin in 1870, to build a road from St. Croix River to Superior, with a branch to Duluth or the Minnesota State line.

Senator Kendrick: What was the relative length of the road?—

Mr. Kerr: It was 150 or 200 miles long. They never built any road at all until after the name was changed to the "Northern Pacific Railway Co." It is a long and very complicated story and it is all in the record.

Mr. McGowan: The only material point on that, Senator, is this: That long prior to the reorganization of the Northern Pacific in 1896, 3,800 shares of stock of the old

Superior & St. Croix had been voted by the Northern Pacific Railroad Co. Now, as the years rolled by and in 1896 when that property, which ostensibly was the property of the Northern Pacific Railroad by reason of the stock ownership, in the proceedings in connection with the putting of new life into that old company the Northern Pacific Railway took the position that the Northern Pacific Railroad did not own the 3,800 shares of stock, notwithstanding the fact that in the earlier days the Northern Pacific Railroad had in fact voted that stock at one of the meetings of the old Superior & St. Croix.

Senator Kendrick: I just wondered why the main line had to do with that particular and apparently unimportant branch of the road.

Mr. McGowan: Well, you see the substance of that is this, that when it was proposed to reorganize the Northern Pacific in 1896 they had to get some company to reorganize on. The reorganizer had to have a charter for the purpose of starting off the new company, to take over the old Northern Pacific Railroad. Then they went back and found this Superior & St. Croix, in which the stock had been voted by the Old Northern Pacific. Then they revivified that company, as I said before, increased the stock to $155,000,000, changed the name to the Northern Pacific Railway Co. and went on with the reorganization.

This is an affidavit filed by Charles H. Coster, of the house of J. P. Morgan & Co., in the 1896 reorganization proceedings. I shall not read the whole affidavit but will ask that it be printed at the end of today's hearings (p. 4690). It has to do with Mr. Coster's statement at the time of the reorganization of 1896, and comments upon the relationship between the stock of the old company and the stock of the new company.

Mr. Kerr: Where does that appear?

Mr. McGowan: That appears at page 433 of volume 3 of the foreclosure suit of the *Farmers' Loan & Trust Co.* v. *Northern Pacific Railroad Co.* Mr. Coster says:

The price at which the common stock of the new company was offered to the holders of the common stock of the old company was fixed solely with reference to the expected value of the stock of the new company and the anticipated market value thereof; and the price at which the common stock of the new company and the preferred stock of the new company was offered to the holders of preferred stock of the old company was fixed solely with refer-

ence to the expected value of such common and preferred stock and the anticipated market value thereof, and in consideration of the transfer to the reorganization managers by the holders of the preferred stock of the old company of equitable rights in $3,347,000 of the consolidated mortgage bonds of the company, and in lands of the old company east of the Missouri River, comprising upward of 4,000,000 acres of land, of which bonds and lands special rights were asserted by the holders of the preferred stock of the old company, and which rights were transferred to the reorganization managers by all of such preferred stockholders as should purchase the common and preferred stock of the new company under the terms of the plan and agreement.

All of these points show the relationship—

The Chairman (interposing): Who was that affiant?

Mr. McGowan: Charles H. Coster, of the house of J. P. Morgan & Co. At the end of the Coster affidavit is a copy of the syndicate agreement of March 16, 1896, between Morgan, the Deutsche Bank, and others. I do not think it will be necessary to reprint that, as a copy of this syndicate agreement is already in the record at page 1979 of the hearings.

Mr. Kerr: Let it read, "Here follows the syndicate agreement appearing at page 1979 of the printed record."

Mr. McGowan: Yes. Now, just a word as to the present status of the Northern Pacific Railroad Co. The Northern Pacific Railroad Co., after the transfer of all the assets to the Northern Pacific Railway Co., proceeded to hold its meetings—of course, it is nothing now but a shadow corporation, but it does hold its annual meetings and elects officers and does have offices in New York in the same room with the Northern Pacific Railway Co. That corporation, the old Northern Pacific Railroad Co., is being kept alive. I make that observation because, if the committee will recall, when Judge Bunn was on the stand, as I construed his statement, he took the position that he did not know just exactly what this Northern Pacific Railroad Co. was now doing. It is a company having life, holding the election of officers right today, although it has no assets.

Senator Kendrick. How long has that activity continued?

Mr. McGowan: Ever since 1896.

Senator Kendrick: Clear down to the present day?

Mr. McGowan: Right today; yes.

Senator Kendrick: The Northern Pacific Railroad Co.?

Mr. McGowan: The Northern Pacific Railroad Co.; yes.

Mr. Kerr: There are, Senator, a number of old stockholders of the Northern Pacific Railroad Co. who did not see fit to take part in the reorganization of 1896, and they have had a suit pending in the United States Court for the District of New York for more than 20 years against the Northern Pacific Railroad Co. and the Northern Pacific Railway Co., and it is therefore for that reason at least that it seems proper to keep alive the organization of the railroad company.

The Chairman: That suit is dormant?

Mr. Kerr: Yes. Many efforts have been made by the defendant to bring it on, but it has been brought by these Philadelphia stockholders who were represented by someone who appeared at the hearings a year ago—made no formal appearance but attended the hearings. If you will remember, in the old briefs the name of Judge McCullen was referred to, and his briefs were put into the record. He was the attorney of record in that case for the plaintiffs.

Mr. McCowan: And in that connection I would like to make a statement for the benefit of the record concerning Judge McCullen. At the hearings of last spring a gentleman appeared here at the hearings by the name of Mr. Dougherty. He was unknown to me at that time, although later during the hearings I became acquainted with him. He turned out to be a representative of Judge McCullen. Mr. Dougherty was a stenographer and typewriter as well as a lawyer, and he, through the information that Judge McCullen had given him, had considerable data in connection with the Northern Pacific. Judge McCullen had been familair with the Northern Pacific case from the angle of the stockholders' suit for a great many years. At the conclusion of the hearings the suggestion was made to me, I think it was by Judge Raker, that Mr. Dougherty was young and able and energetic, and in view of the fact hat the committee had authorized me to make some inquiries in connection with the books of the company, he might prove to be an able assistant. Judge Raker left the matter to my discretion, however. After the hearings were over I made a trip over to Philadelphia and

had a talk with Judge McCullen about the case. Judge McCullen is on the bench in Philadelphia. He is a lawyer of ability and standing, and, so far as I know, is a man of the highest integrity.

After I returned from Philadelphia I deliberated over the advisability of having Mr. Dougherty accompany me on my trip of inquiry in connection with the Northern Pacific books. I finally concluded that I would not have Mr. Dougherty go with me, and I did that for two reasons: First, I did not want anybody to have any semblance of anything that would lead to the conclusion that my case was tied in any way with this old case of the stockholders, and in addition to that—and this reason was of equal importance—I felt that when the committee had authorized me to go and make the inquiry into the books of the company, I should preserve whatever authority was given to me with the greatest care, and I felt that, although there was this difference of opinion between the Government and the Northern Pacific in connection with this land grant I should not permit an antagonistic outfit—that is, an outfit that was antagonistic to the Northern Pacific—to appear with me and look at the books of the company at the same time. I did not think that such action as that would meet with the favor of the committee, and certainly after considering it, it did not meet with my approval. I felt that while we were scrapping the Northern Pacific, I wanted to be honorable and upright and fair with them, and consequently I decided I would not let the other fellow come in by the back door, as if to use the power of the committee to look at the books of the company as it might be construed when they could not do it possibly in another way.

I have stated this rather crudely, but that is the substance of the situation, and for that reason I thought it best not to have Mr. Dougherty accompany me, and he did not accompany me.

I went on trips to New York and St. Paul, where I looked into the books of the Northern Pacific to some extent, and then returned to Washington. Now, in making this observation I make it in no spirit of hostility at all to Judge McCullen or to what the merits may have been of his controversy with the Northern Pacific. He is an able man and knows what is best from his own standpoint.

Mr. Kerr: I want to say, Mr. McGowan, I think your action was highly creditable.

Mr. McGowan: Thank you, Mr. Kerr, I tried to deal fairly with you on that point.

After I came back from St. Paul I went again to Judge McCullen—now, mind you, I was, of course, trying to get all the information I could from Judge McCullen or anybody else in this matter. There was some discussion in Judge McCullen's office over there in Philadelphia, and I had to take the position there with Judge McCullen that I could not talk with him about any of the data that I had gathered from the books of the Northern Pacific, although I would be glad to take anything that he had and look it over for the purpose of seeing whether or not it had any bearing on the matter from my standpoint.

Well, to make a long story short and to make it perfectly clear to Judge McCullen, and notwithstanding any position I took that if he had anything to tell the committee I thought the committee would be glad to hear it, and along that line a letter was addressed to Judge McCullen on April 3, 1926, as follows—this was written, signed by Judge Sinnott:

Hon. J. P. McCullen,
City Hall, Philadelphia, Pa.

Dear Mr. McCullen: The hearings in connection with the Northern Pacific land grant will be resumed at Washington, D. C., on April 14. The committee extends to you an invitation to appear before it for the purpose of presenting such testimony as you may desire to offer.

This invitation is sent to you at the suggestion of Mr. McGowan.

Sincerely yours,
N. J. SINNOTT,
Chairman Joint Committee to Investigate
Northern Pacific Land Grant.

Judge McCullen—he is a busy man—for some other reason that was satisfactory to him, did not see fit to come down, but Mr. Boylan, one of his associates, has been at the hearings since they started this spring. Mr. Boylan has handed to me a memorandum which comes from Judge McCullen in connection with this matter, and asks that I propound this question to Mr. Kerr. I have no objection

to doing that, but Mr. Boylan is here in the room, and perhaps he would rather ask that question.

Mr. Thomas Boylan: I think the question should be given by you to the committee, Mr. McGowan, if it has any relevancy. I do not think I should interfere in any way, because I have no standing here. Won't you ask it, Mr. McGowan, if you think it is of enough importance?

Mr. McGowan: The only hesitancy I have about asking the question is that I have not sufficient familiarity with the matter referred to, the particular item referred to, to know the surroundings. Judge McCullen, as I understand it, thinks that the question he asks has some bearing on the matter. I have no objection to asking it, and I will read the memorandum as Mr. Boylan has presented it, and then leave it to the committee to decide whether they want Mr. Kerr to answer it or not. The following is the question:

On August 27, 1897, there was filed with the Interstate Commerce Commission a report of the Northern Pacific Railroad Co. (stated by the receiver) for the two months ending August 31, 1896.

Page 49 of this report is the comparative balance sheet. On this page, under the caption "Other assets", appears an item "Assets transferred to Northern Pacific Railway Co., $2,769,441.91".

There is no explanation of this item given in the report. I ask counsel for the Northern Pacific Railway Co. to furnish complete information as to what this entry represents and what relation it bears to the land grant to the Federal corporation. What relation, if any, exists between this item of $2,769,441.91 and the $2,775,000 stated to be the holdings of the Northern Pacific Railway Co. in the Northwestern Improvement Co. in or about 1908?

That is the question that is propounded by Mr. Boylan.

Mr. Kerr: Perhaps a short cut to the solution of whether the question shall be asked will be my voluntary statement that I don't know anything about it.

The Chairman: Can you ascertain that?

Mr. Kerr: It is possible that I can. I don't know.

The Chairman: I wish you would see what you can ascertain about that.

Mr. Kerr: I will do that.

Mr. McGowan: Mr. Boylan hands me the following additional question which he asks be incorporated in the question to Mr. Kerr, as follows:

Is it not a fact that in the Northern Pacific system there were certain underlying preferred stocks having a lien upon the land grant of the Northern Pacific Railroad Co. and of a portion of the land grant of the St. Paul & Pacific in Minnesota, and also certain land-grant bonds upon said land grants of said companies; and were these not used as basic securities prior to the reorganization of 1875, and subsequently to that reorganization down to and including the present time, notwithstanding the reorganization of 1896?

Mr. Kerr: So far as the Northern Pacific is concerned I can answer that, I think, in the negative; so far as the St. Paul & Pacific is concerned, I have no information whatever.

In the National Power and Paper Company case, 122 Minn. 355, 142 N. W. 820, the Court held that after a suit brought by a corporation to cancel a fraudulent issue of its stock was collusively dismissed by the directors, then the stockholders could move to vacate the dismissal and prosecute the action, and the decision is sustained by numerous citations.

In *Morgan's Louisiana & Texas R. & S. Co.* v. *Texas Central R. Co.,* 137 U. S. 171, at 201, 34 L. Ed. 625, at 635, the Court said: "'A cross bill,' says Mr. Justice Story (Eq. Pl. sec. 389), '*ex vi terminorum* implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the orignal bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.' And as illustrative of cross bills for relief, he says (sec. 392): '*It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill or cross bills, to bring every matter in dispute completely* before the court, to be litigated by the proper parties, and upon the proper proofs.'

"It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the *bill* in question *was necessary* and was *correctly styled a cross bill.* In no proper sense

were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross-bill, but that is immaterial. The subject matter was the same, although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control. *Milwaukee & M. R. Co.* v. *Soutter,* 69 U. S. 2 Wall. 609 (17:886); *People's Bank* v. *Calhoun,* 102 U. S. 256 (26:101); *Krippendorf* v. *Hyde,* 110 U. S. 276 (28:145)."

In *Neal* v. *Foster, et al.* (C. C., Oregon), 34 Fed. 496, the Court held that a cross bill is a mode of obtaining relief or making a defense to which a defendant may resort as against the plaintiff or a co-defendant in the original bill, without leave of the Court, and the question of his right to file the same when and as it may be done, may be made and determined on demurrer.

In *Guarantee Trust & Safe Deposit Co.* v. *Duluth & W. R. Co., et al.* (C. C. Minnesota), 70 Fed. 803, it was held that where it was alleged that the directors for the pur-

pose of sacrificing the interests of the stockholders, refuse to defend a suit, a court of equity will permit the stockholders to intervene and become parties defendant and file an answer *and cross bill* so as to protect their own interests and the interests of the other stockholders who may choose to join them in the defense.

The text in 21 Corpus Juris. 503, states that a cross bill may be filed "after the hearing, if justice requires", citing *Cartwright* v. *Clark,* 4 Metc. (Mass.) 104; *Roberts* v. *Peavey,* 29 N. H. 392, but the text states that this is not ordinarily the rule. The text at 504 states: "One who has been impleaded in a suit and whose interest is admitted by the pleadings cannot be deprived of the right to file a cross bill therein at any time it becomes necessary to protect his interest," citing *Ulman* v. *Iager,* 155 Fed. 1011 (S. D. W. Va.), which *sustains the text* in an *opinion by Judge Dayton* and held that while a cross bill cannot be maintained in a suit after it has been settled, a tenant in common who has been impleaded in a suit between the co-tenants to establish the interest of each and obtain partition, and whose interest is admitted by the pleadings, *cannot be deprived of the right to file a cross bill therein at any time it may become necessary to protect his interest in the property* by a settlement between his co-tenants.

New parties may be brought in by a cross bill which seeks affirmative relief, and is not merely defensive, when they are necessary to the granting of such relief, and Judge Dayton said: "Again, it is the very touchstone of equity jurisprudence that, having taken jurisdiction, it will administer plenary justice to all parties who may have interests in the subject-matter according to their right. No controversy is ever 'settled' or ended in that court until all such rights and interests are fixed and determined by its decree, and this is true regardless of the time and delay involved in its doing so. A court of equity recognizes neither laches nor limitation in its own administration. I am, therefore, constrained to hold this first ground of demurrer untenable."

In *Hough* v. *Wat*son, 91 W. Va. 161, 112 S. E. 303, where many years after a suit was filed, an answer and cross bill were filed and demurrer was sustained to the an-

swer and cross bill by the lower court, and same was reversed on appeal.

In *Ogden* v. *Gilt Edge Consol. Mines Co.,* 225 Fed. 723, at 728 (C. C. A. 8), the Court held and stated: "That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well recognized principle of equity jurisprudence. *Hawes* v. *Oakland,* 104 U. S. 450, 26 L. Ed. 827; *Bronson* v. *LaCrosse R. Co.,* 2 Wall. 283, 17 L. Ed. 725; *In re* Swofford Brothers D. G. Co. (D. C.), 180 Fed. 549, 553.

"Equity rule 27, formerly 94 (198 Fed. xxv. 115 C. C. A. xxv), which requires certain preliminary steps to be taken by the stockholder before bringing his suit, will be dispensed with when the interests of the directors are antagonistic to those of the corporation, where this fact is shown by the pleadings. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. The allegations in the petition for leave to intervene, and the proposed answer made a part thereof, clearly show such a condition of affairs as to justify stockholders to intervene and defend on behalf of the corporation, when the directors, charged with the protection of the corporate property, are adversely interested, and not only refuse to defend, but confess judgment, as is alleged in the proposed answer and as is shown by the record to have been done. If the allegations in the proposed answer were not specific enough in charging fraud against the directors, a motion to make more specific would have been proper. But, in any event, when the petition for leave to intervene was denied upon that ground it was the duty of the court to permit an amendment when requested by the parties. It is well settled that in equity proceedings the parties are entitled to a reasonable time to amend their pleadings. A refusal to grant such leave is error. *Files* v. *Brown,* 124 Fed. 133, 142, 59 C. C. A. 403, 413; *In re* Broadway Savings Trust Company, *supra.*"

Fitzwater v. *Nat. Bk. Seneca,* 62 Kan. 163, 61 Pac. 684, held: "The stockholders of a corporation who allege that their company has a valid defense to a suit brought against it, but which its managing officers wrongfully or fraudulently refuse to make, are entitled to intervene in

the suit and defend for the company, upon their tender of an answer stating valid matters of defense to the action, and the making of a showing, by evidence, of reasonable grounds to believe that such defense can be finally proved upon a trial of the case, and that the officers whose duty is to make it are wrongfully or fraudulently refusing to do so."

(Syllabus by the Court.)

In *Secor* v. *Singleton,* 41 Fed., at 727 (C. C. Mo.) Judge Thayer said and held: "Although the bill was filed by stockholders of the railway company, they did not sue to enforce an individual right, but solely to enforce a right or immunity that pertained to the corporation. *The suit was essentially a suit by the corporation* against the counties that the *stockholders were allowed to prosecute in its behalf,* because the directors had been negligent in asserting the right of the corporation. *Dodge* v. *Woolsey,* 18 How. 331; *Memphis* v. *Dean,* 8 Wall. 73. Inasmuch, then, as the suit was, in effect, a suit by the railway company against the counties, and was likewise an equity proceeding, it is wholly immaterial how the parties were arranged upon the record. The decree rendered was certainly a conclusive adjudication, between the company and the counties, that the property of the former was exempt from taxation, and in a suit between them might be invoked as an estoppel."